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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 323–325) is reported at 331 F. 2d 839. The Board's decision and order (R. 292–308) are reported at 142 NLRB 1362.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1964 (R. 326). The petition for a writ of certiorari was filed on July 6, 1964, and was granted on October 12, 1964 (R. 327). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the absence of special circumstances, an employer engaged in collective bargaining with a labor union is privileged to lay off his employees for the purpose of compelling the union to accept his terms.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), are set forth in Appendix A, pp. 33–38, *infra*.

STATEMENT

Petitioner builds and repairs ships at four shipyards adjacent to the Great Lakes. The Company's busy season is between November and April, when the Lakes are often frozen and shipowners are more willing to take their vessels out of service for repair (R. 272; 74, 156). During the summer months, however, petitioner has always retained a nucleus of employees to perform yard maintenance and emergency repairs, and to prepare for the winter (R. 273; 74, 78, 191, 213).

In the spring of 1961, petitioner and a negotiating team representing eight craft unions exchanged proposals for a new contract to replace the existing contract due to expire on August 1. Bargaining continued during June and July (R. 262–264). At the first bargaining session, the Union's chief negotiator, Alexander, announced that the Unions wished to negotiate an agreement without a strike, and thus to

avoid the shutdowns that had occurred in five of the previous ten years (R. 262, 269; 28). He assured petitioner that the Unions "definitely did not intend to have a strike" (R. 269; 31–32), and other Union representatives told the Company that it could freely accept jobs because the employees would guarantee completion of whatever work was in the shipyards (R. 269–270; 31–32).

On July 19, when the parties had agreed upon 20 articles of a new contract (R. 110, 137–139), the Unions proposed a six-month extension of the old agreement, which contained a no-strike clause (R. 263; 34). The Company rejected the suggestion on the ground that the extension would expire at the height of the busy season (*ibid.*). The Unions repeated their extension proposal on July 31 and made several counterproposals with respect to issues still dividing the parties (R. 264; 34–35, 112–113). The counterproposals were all rejected, but the Company asked and the Unions agreed that the Company's latest offer be presented to the employees. The Unions suggested further that the existing contract be extended until a new agreement, to be made retroactive to August 1, had been reached (R. 264; 35). While rejecting that proposal without explanation (R. 264; 35, 177), the Company agreed to extend the existing contract long enough for the union members to vote. The Company then asked whether the Unions were planning to strike the following morning. Alexander replied that they were not, reminded the Company that the Unions had consistently stated that they

would not strike, and reiterated that assurance (R. 264; 35–36). The employees continued to work after the contract expired on August 1 but rejected the Company's latest proposal (R. 264; 35–36). When Company negotiators inquired on August 8 why the Unions had not struck (R. 264; 38), Alexander replied that the Unions "had insisted that we never intended to strike" (R. 264; 38). The next day the Unions refused to take a new Company proposal back to the membership on the ground that it was less generous than the Company's previous offer (R. 265; 63–64).

Two days later, the Company shut down its Chicago yard, notifying the employees that it was laying them off because of "the labor dispute which has been unresolved since August 1, 1961" (R. 265–266).[1] In addition, petitioner laid off most of its employees at the Toledo yard, and began progressively to lay off workers at the Buffalo yard. At Lorain, however, an extensive force was engaged in the alteration of a large tanker, and none of those men was laid off (R. 272; 150–151). As the job was completed the Company laid off the Lorain employees. No employees at any yard went on strike (R. 247).

[1] The Company determined to word the layoff notices in that manner in order to deprive the laid-off employees of unemployment compensation (R. 266). In Illinois the employees were unable to obtain unemployment compensation because under Illinois law loss of work as a result of a labor dispute is noncompensatory. In Ohio and New York, when employees filed for benefits, the Company protested the allowance of compensation (R. 266; 129–130).

On August 19, at another bargaining session, the Company's attorney stated that the Company could not take on any work because it did not know when the Unions were going to strike. In reply, Union representatives repeated their assurance that there would be no strike, again guaranteed that work taken into the yards would be completed, and pointed out that no employees had quit at Lorain (R. 40–42). Finally, on October 22, a new contract was signed, and the laid-off employees were recalled to resume the emergency and maintenance work they had been doing prior to the August layoffs (R. 267, 274; 73, 74).

The Board concluded that petitioner had violated Sections 8(a) (1) and (3) of the National Labor Relations Act by curtailing its operations and laying off its employees to force the Unions to abandon their contract demands (R. 295–296). Without disturbing the Trial Examiner's finding that the parties had bargained to an impasse (R. 292, 280–282), it rejected petitioner's contention that the lockout was privileged under Board cases holding that lockouts were lawful to protect customers' property, prevent inventory spoilage, or guard the public safety from the effects of an imminent strike (R. 295).[2] Since the Unions had given numerous assurances that they would not strike and had promised that work in petitioner's yards would be completed, the Board found that petitioner

[2] See pp. 26–28, *infra*. The Trial Examiner had found the lockout privileged on this ground, and two dissenting Board members would have accepted the finding (R. 286–290, 301–305).

could not reasonably have feared a strike. It held, therefore, that the lockout had been used by petitioner as an "offensive weapon intended to force abandonment of the union's contract demands and the acceptance of the employer's" (R. 295–296) and hence violated the Act. It ordered petitioner to cease and desist from such illegal conduct in the future and to reimburse certain of the laid-off employees for loss of pay (R. 295, 297–298).[3]

The court of appeals enforced the Board's order. Viewing the problem as one of balancing the legitimate interests involved, the court concluded that the balance struck by the Board was entitled to stand (R. 323–325).[4]

ARGUMENT

Introduction and Summary

The findings of the Board, sustained by the court below, show that the employer, after an impasse in bargaining had been reached and even though a strike was not imminent, temporarily laid off or locked out his employees for the sole purpose of compelling them to accede to his contract terms rather than those sought by their union representative. The question presented is whether, in these circumstances, a so-

[3] Since the complaint was restricted to the layoffs at petitioner's South Chicago yard, the backpay order was similarly restricted (R. 297–298).

[4] The court also rejected certain contentions of Local 374, International Brotherhood of Boilermakers, the charging party, which had been advanced to enlarge the scope of the Board's remedial order (R. 324). Those contentions are not relevant here.

called "bargaining lockout" is a form of interference and restraint prohibited by Section 8(a)(1), and of discrimination prohibited by Section 8(a)(3), of the Act (pp. 14, 35, *infra*).[5]

Whereas the right to strike is explicitly safeguarded by Sections 7 and 13 of the Act, "there is no express provision in the law either prohibiting or authorizing the lockout * * *."[6] *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 92 (hereafter referred to as the *"Buffalo Linen"* case). Although the lockout was permissible without

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[5] The instant case has been set for argument following *National Labor Relations Board* v. *John R. Brown*, No. 7, this Term (R. 327). In that case, which involves a multi-employer bargaining unit, it is clear that the non-struck employers in the unit had a right to lockout when one of their members was struck (see pp. 28–29, *infra*). The question in *Brown* is whether they exceeded the privilege of defense of the multi-employer unit when they resumed operations, not with their regular employees, who were ready and willing to go to work, but with temporary replacements.

[6] It is misleading, therefore, to frame the question, as petitioner does (Br. 2), in terms of whether "an employer lockout is a corollary of the employees' right to strike." For it is plain that the two are not parallel. Thus, employees can strike against an employer's anti-union campaign but even petitioner concedes that a lockout may not be used in furtherance of such a campaign (Br. 12–13; see cases cited, n. 8, p. 9, *infra*). Similarly, although at common law there was no legal limitation on the use of the lockout (Pet. Br. 13), the right to strike was subject to many restrictions. See Millis and Montgomery, *Organized Labor*, 555–565 (1945). And, while a strike can be engaged in before an impasse in the bargaining is reached, some authorities who seek to equate the lockout and the strike would privilege the lockout only after impasse. See *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 582 (C.A. 7); but cf. n. 14, p. 17, *infra*.

restriction at common law, the absence of any specific reference in the Wagner Act does not signify Congressional approval. For the Act "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice," but "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms."[7] *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 798. The legal status of the lockout, therefore, as the Court indicated in *Buffalo Linen,* is to be determined by "the balancing of the conflicting legitimate interests" involved in each situation. "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." (353 U.S. at 96).

Petitioner concedes that a lockout is unlawful when its purpose is to frustrate the union's organizational efforts, undermine its position as bargaining representative, or discourage union membership (Pet. Br.

[7] Similarly, the fact (Pet. Br. 14) that many collective bargaining agreements contain provisions barring lockouts as well as strikes is of little significance. Such agreements frequently incorporate obligations which are already imposed by law, for example: forbidding discharges on account of union activity; recognizing the union as lawful bargaining agent of its employees; prohibiting secondary boycotts and sympathy strikes; and providing for union liability in the event of a strike in violation of the contract.

13, 17).[8] But, so long as the objective is merely to strengthen the employer's hand at the bargaining table and thereby force the employees to accept his terms, petitioner regards the lockout as a wholly legitimate weapon of economic warfare—regardless, apparently, of its effect upon the employees' protected rights. In support of that proposition, it draws upon the analogy of *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, in which this Court upheld the right of an employer to hire permanent replacements for striking workers.

It is clear, however, that the absence of an illegal motive does not in itself excuse conduct which inherently interferes with lawful concerted activities. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17; *Buffalo Linen, supra; National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221; *National Labor Relations Board* v. *Burnup and Sims, Inc.*, No. 15, this Term, decided November 9, 1964. Rather, the lawfulness of such conduct depends, as we have indicated, upon a "balancing of the conflicting legitimate interests." *Buffalo Linen, supra*, 353 U.S. at 96.

The principle is conclusively illustrated by the *Erie Resistor* case, *supra*. There the Board, without find-

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[8] *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681 (C.A. 1); *National Labor Relations Board* v. *Stremel*, 141 F. 2d 317 (C.A. 10); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (C.A. 2), certiorari denied, *sub nom. Modern Mfg. Co.* v. *National Labor Relations Board*, 344 U.S. 816; *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 238 (C.A. 8), certiorari denied, 334 U.S. 845.

ing an illegal motive, held that an employer had violated Sections 8(a) (1) and (3) of the Act by offering super-seniority rights to employees whom he hired as permanent replacements for striking workers. In so ruling, the Board rejected the contention that super-seniority granted during a strike is a legitimate corollary of the employer's right of replacement under *Mackay*. This Court affirmed, pointing out (373 U.S. at 229) that the Board had properly conceived its task, not as a quest for subjective motive, but as "the far more delicate task * * * of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." And since "the Board's judgment was that the claimed business purpose would not outweigh the necessary harm to employee rights—a judgment which we sustain—it could properly put aside evidence of respondent's motive and decline to find whether the conduct was or was not prompted by the claimed business purpose" (373 U.S. at 236–237). The super-seniority plan, condemned in *Erie Resistor*, and the replacement of strikers, approved in *Mackay*, differed not in respect to motivation, but rather in the degree of their impact upon protected employee rights. "Because the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment

resulting from super-seniority in addition to permanent replacement" (373 U.S. at 232). By the same token, we submit, the fact that the employer's interest in keeping his plant running was held to justify the harmful conduct in *Mackay* does not necessarily mean the employer's less weighty interest in achieving a bargaining victory will outweigh the damaging consequences of the lockout here.[9]

The questions to be answered, therefore, are (1) whether the bargaining lockout interferes with protected employee rights and, if so, (2) whether the lockout may nonetheless be justified by some overriding interest of the employer.

In the Board's view a lockout during contract negotiations clearly falls within the literal ban of Section 8(a). To deprive employees of their livelihood because of demands made by their representative at

[9] Petitioner argues (Br. 17–18) that it would be inconsistent to sanction the permanent replacement of economic strikers, which was done in *Mackay*, and yet to prohibit a temporary lockout which has a less severe impact upon the employees involved. The question here, however, is not whether replacement of strikers has a more adverse effect upon employees than a lockout, but whether it would further the basic aim of the Act if employers were given the general right to lockout in addition to the right to replace economic strikers. Furthermore, in one respect the lockout may have a greater impact than the replacement of strikers, since it affects all employees in the unit, whereas replacement affects only those replaced. Finally, the employer's replacement of strikers in *Mackay* was to defend itself against an existing strike by continuing to operate its business, whereas in the present case petitioner's lockout was used as a weapon in its economic contest with the Union at a time when no strike was even threatened.

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the bargaining table, and in order to compel their submission to the employer's demands, "coerces" them in the exercise of their right to bargain collectively and discourages resort to that right. In addition, it interferes with the right to strike, preempting the use of the strike weapon and depriving the union of control over the timing of the economic contest.

Such conduct is lawful, therefore, only if the adverse impact upon employee rights is outweighed by a legitimate countervailing interest of the employer. The Board has found such justification in two classes of cases: *First,* it has permitted employers to discontinue operations in the face of an imminent strike threat, in circumstances where a sudden strike would have subjected the employer to property loss, contract damages, or other economic injury above and beyond the loss of business normally incident to a work stoppage. In such cases, the lockout serves a purely "defensive" purpose and, on balance, is justified. *Second,* the Board has sanctioned lockouts by the non-struck members of a multi-employer bargaining unit in response to a strike against one member to enforce contract demands against all; in that situation, the lockout serves the legitimate defensive purpose of protecting the multi-employer unit against disintegration through successive strikes against each member individually.

In cases such as the present, however, where there is no imminent threat of a strike likely to cause extraordinary injury (or indeed any strike at all), and

where the lockout is used solely as an offensive bargaining weapon, the Board has concluded that no overriding employer interest is present. Neither the obtaining of a favorable contract, nor the avoidance of the normal consequences of a strike at some indeterminate time in the future, is an interest of sufficient weight to justify the harm inflicted upon employee bargaining rights. We submit that the balance struck by the Board is reasonable and should not be disturbed.[10]

THE BOARD REASONABLY BALANCED THE COMPETING INTERESTS IN CONCLUDING THAT A SINGLE EMPLOYER MAY NOT LOCKOUT HIS EMPLOYEES IN ORDER TO COMPEL THEM TO SUBMIT TO HIS BARGAINING DEMANDS

A. THE BARGAINING LOCKOUT SERIOUSLY INTERFERES WITH THE RIGHT TO STRIKE AND THE RIGHT TO ENGAGE IN COLLECTIVE BARGAINING

1. In Section 1 of the National Labor Relations Act (p. 33, *infra*), Congress found that inequality of bargaining power between employees and employers obstructed the free flow of commerce and aggravated business depressions. The purpose of the Wagner Act was to remove that obstruction, and redress that inequality, by enhancing the bargaining power of the employees.

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[10] The Board's position has been sustained by three other circuits as well. *Quaker State Oil Refining Corp.* v. *National Labor Relations Board*, 270 F. 2d 40 (C.A. 3), certiorari denied, 361 U.S. 917; *Utah Plumbing & Heating Contractors Ass'n* v. *National Labor Relations Board*, 294 F. 2d 165 (C.A. 10); *Body & Tank Corp.* v. *National Labor Relations Board* (C.A. 2), decided December 3, 1964 (set forth in Appendix B, *infra*, pp. 39–45). *Contra: National Labor Relations Board* v. *Dalton Brick & Tile Corp.*, 301 F. 2d 886 (C.A. 5).

To that end, Section 7 of the Act guarantees to employees the right—

> to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 13 adds that—

> Nothing in this Act, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *.

Those guarantees are implemented by Sections 8(a)(1) and (3). The former makes it an unfair labor practice for an employer—

> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

The latter makes it an unfair labor practice for an employer—

> by discrimination in regard to hire or tenure of employment * * * to * * * discourage membership in any labor organization:

We submit that the bargaining lockout falls within the literal ban of Section 8(a)(1).[11] To deprive em-

[11] It also violates the literal terms of Section 8(a)(3), for depriving employees of work in these circumstances is "discrimination" which forseeably discourages union membership and activity. Detrimental treatment constitutes Section 8(a)(3) "discrimination" even if it is meted out equally to union members and nonmembers. See, *e.g.*, *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681 (C.A. 1) (lockout

ployees of their livelihood on account of the demands made by their representative at the bargaining table, and in order to force their submission to the employer's terms, "coerces" them in the exercise of their right to bargain collectively and discourages resort to that right.[12] In addition, it severely impairs the effectiveness of the right to strike. Unlike the permanent replacement of strikers, which merely counteracts the effect of a strike after it has been called, the lockout preempts the use of the strike weapon altogether. Moreover, by depriving the union of the ability to control the timing of the economic showdown, such a lockout destroys an essential aspect of the right to strike.

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upon demand for collective bargaining): *National Labor Relations Board* v. *Stremel*, 141 F. 2d 317 (C.A. 10) (same); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (C.A. 2), certiorari denied *sub nom. Modern Mfg. Co.* v. *National Labor Relations Board*, 344 U.S. 816 (same). However, since the finding of a Section 8(a)(1) violation would alone be sufficient to sustain the Board's order, here, as in *National Labor Relations Board* v. *Burnup and Sims, Inc.*, No. 15, this Term, decided November 9, 1964, slip opinion, p. 2, the Court may "find it unnecessary to reach the questions raised under § 8(a)(3)."

[12] Petitioner suggests (Br. 18) that the refusal of an employer to yield to the union's demands would similarly weaken the union's position and encourage defections among its members. It is one thing, however, to say that an employer may reject his adversary's demands and quite another thing to say that he may throw his employees out of work in order to make them acceed to his demands. The right to say no is inherent in the very concept of "bargaining"; but the ability to inflict damage upon one's opponent in order to compel his acquiescence plainly is not. How smoothly the collective bargaining process can operate without the lockout is evidenced by the relative infrequency of its use in recent years.

Since a work stoppage is highly costly to the union and the employees, as well as to the employer, strikes are seldom called except as a last resort. It is the ever present (and sometimes imminent) possibility of a strike, rather than the strike itself, which exerts pressure on both sides to adjust their differences and reach agreement.[13] The efficacy of that pressure, however, and the parity of bargaining power which the Act seeks to attain, depend in large measure on the employer's uncertainty as to when the shutdown will come and his fear that it will come when he is most vulnerable. If an employer were permitted to effect a shutdown on his own initiative and on a date of his own choosing, the threat of a strike would carry far

[13] As one study has pointed out (*Factors in Successful Collective Bargaining*, Report of the Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare of the United States, 82d Cong., 1st Sess., 7):

"* * * The strike threat, and the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory settlements. Agreement normally is reached without a work stoppage because neither side wants to incur the cost of such stoppage and makes reasonable adjustments to avoid it.

* * * * *

"* * * reliance on collective bargaining means dependence on the possibility, even the imminence, of a strike in every collective bargaining session. The calculation of the cost of a strike to the parties facilitates a meeting of minds without actual resort to the strike and thus performs a vital collective bargaining function * * *.

* * * * *

"The threat of a strike, which must be exercised when necessary if it is to remain a threat, is the drive which gives continuous meaning and substance to collective bargaining. * * *"

See, generally, Kerr, *Bargaining Processes*, in Bakke, Kerr, Anrod, *Unions, Management and the Public*, 284 (1960); Slichter, *The Determinants of Bargaining Power*, in Bakke & Kerr, *Unions, Management, and the Public*, 205 (1948); Hiller, *The Strike, A Study in Collective Action*, 126–132 (1928).

less influence at the bargaining table. For, by stockpiling inventories, readjusting contract schedules, and transferring work from one plant to another, the employer can often make himself virtually "strike-proof" during the period following the expiration of a contract. And if, in addition to these legitimate defensive measures, he were at liberty also to lockout his employees at this moment of maximum strength, the union would be at his mercy.[14] The Board has reasonably concluded that the availability of such a weapon would so substantially tip the scales in the employer's favor as to defeat the Congressional purpose of placing employees on a par with their adversary at the bargaining table. See *Body & Tank Corp.* v. *National Labor Relations Board* (C.A. 2), decided December 3, 1964 (Appendix B, *infra,* p. 44). To permit the preemptive lockout, moreover, would run counter to the "positive command of § 13 that the right to strike is to be given a generous interpretation" and would be incompatible with the "deference paid the strike weapon by the federal labor laws." *Erie Resistor, supra,* 373 U.S. at 234–235.[15]

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[14] If, as petitioner contends, the bargaining lockout were deemed to be the counterpart of the strike, there is no logical reason why the employer would not be able to lockout even before an impasse in the bargaining were reached. See Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. Chi. L. Rev. 70, 73, n. 19 (1956); but cf. *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 582 (C.A. 7).

[15] See also *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457, n. 3; *Amalgamated Ass'n of Street Electric Railway Employees* v. *Wisconsin Board*, 340 U.S. 383, 395, n. 21; *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 673, n. 8.

Additionally, the bargaining lockout would militate against the Act's broader objectives of preventing obstructions to commerce and promoting labor peace. For it would generate work stoppages which might not otherwise have occurred and prolong others which might have been terminated by the employees themselves.[16] Moreover, even when not actually used, the very availability of the lockout would serve as a constant provocation; unions which had little interest in striking might well deem it prudent to take preemptive action in order to avoid being subjected to a lockout at a time when the balance of advantages was less favorable. And conversely, as in the present case, the merest possibility of a future strike might suffice to trigger a preemptive lockout. In light of these considerations, the Board properly held that the bar-

[16] If employees go out on an economic strike, the employer is free to find permanent replacements for them. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. However, it has heretofore been held that, if a striker offers unconditionally to return to work before he has been permanently replaced, the employer commits an unfair labor practice if he refuses to take him back. See *Fifth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *Shenandoah-Dives Mining Co.*, 145 F. 2d 542, 547 (C.A. 10). But, if the bargaining lockout were permissible, it would follow that the employer could not only force employees to strike, but he could refuse to reinstate unreplaced strikers who were willing to return to work until they acceded to his contract demands—thereby depriving employees of the power to terminate a strike and prolonging the work stoppage. See *American Stores Packing Co.*, 142 NLRB 711, 712, 719, petition for enforcement filed (C.A. 10), No. 7702.

gaining lockout interferes with rights protected by the Act and, *prima facie* at least, is unlawful.

2. This conclusion is in no way inconsistent with the Court's holding in *National Labor Relations Board* v. *Insurance Agents' International Union*, 361 U.S. 477. There the Board sought to outlaw disruptive on-the-job union tactics as a violation of the duty to bargain in good faith under Section 8(b)(3) of the Act (361 U.S. at 490). This Court disapproved the order on the ground that the use of such economic pressure was not necessarily indicative of bad faith and that the Board could not regulate the parties' choice of economic weapons under the guise of determining their "good faith" in the negotiations. The most that can be inferred from that case is that the lockout here would not constitute a breach of the employer's duty to bargain in good faith under Section 8(a)(5). But it was not on that ground that the Board condemned the lockout. The fact that an employer may be genuinely interested in reaching an agreement assuredly does not insulate his conduct from scrutiny under Sections 8(a)(1) and (3). Those subsections are intended to protect employees against *all* employer conduct—including the use of bargaining weapons—which unduly interferes with the exercise of rights granted them by the Act. Since there are no comparable provisions for the benefit of employers, the issue presented here was not even potentially involved in *Insurance Agents'*.

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It is plain that the super-seniority plan struck down in *Erie Resistor* stands on no better footing when viewed as a bargaining tactic than when regarded as a defensive measure aimed at keeping the plant open. So, too, a permanent discharge, as distinguished from a temporary layoff, of all employees in a bargaining unit would clearly be barred, even if its purpose were the "innocent" one of strengthening the employer's bargaining position by forcing the union to surrender contract demands in return for the employees' reinstatement. *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 204 F. 2d 529 (C. A. 7), certiorari denied, 346 U.S. 909. Indeed, in *Insurance Agents'* the Court recognized (361 U.S. at 499) that the Board plays a different role in applying the statutory policies of the National Labor Relations Act when it determines the validity of the lockout and its impact upon employee rights than when it determines whether there has been a failure to bargain in good faith.

3. Nor do the Taft-Hartley amendments indicate a Congressional purpose to sanction the bargaining lockout. Section 8(d) (4) of the amended Act (p. 36, *infra*) requires the parties to give 60 days' notice of contract termination and, pending the expiration of this period, to keep the contract in effect "without resorting to strike or lockout." This provision may imply that the lockout is permissible in some circumstances (Pet. Br. 14–15), but it does not indicate what those circumstances are.[7] It is clear, for exam-

[7] The same may be said for the reference to strikes and lockouts in Sections 203(c), 206, and 208(a) in Title II of the Labor-Management Relations Act (pp. 37–38, *infra*), and for the Wagner Act history noted by the Court in *Buffalo Linen*, 353 U.S. 87, 92, n. 15.

ple, that Section 8(d) would not privilege a lockout in furtherance of an anti-union campaign after a 60-day waiting period; for that section must be read in harmony with the other provisions of the Act, including Sections 8(a), 7, and 13.

It does not follow that, because Section 8(d)(4) equates the terms "strike and lockout" and a strike in support of bargaining demands after the 60-day period would be lawful, Congress intended a bargaining lockout to have the same privilege (Pet. Br. 21). As the Board has pointed out (*Morand Bros. Beverage Co.*, 99 NLRB 1448, 1463–1464):

> It seems clear to us from a reading of Section 8(d)(4) that the sole concern of Congress in enacting that provision * * * was to discourage resort to self-help by *both* employees and unions during the 60-day period and to induce them to bargain collectively during that period. It is understandable that, in seeking to underscore this purpose, Congress would specifically proscribe the most relevant forms of self-help—namely, strikes and lockouts. It follows from this view that Congress was not concerned at this point with the legal status of strikes and lockouts under other provisions of the Act but was solely desirous of insuring that, *whatever that status might be,* no strikes or lockouts would occur during the 60-day period.

Petitioner also points to the fact that, in the Taft-Hartley amendments, Congress intended to increase

the relative power of employers (Br. 14–15).[15] But, as the Board has stated (*Morand, supra,* at 1464):

> If that argument has any basis at all, it derives from the fact that in Section 1 of the Act, as amended in 1947, Congress, while retaining the original declaration of its purpose to eliminate the inequality of bargaining power arising from the superior economic strength of employers as against unorganized employees, further stated as its purpose to eliminate "certain practices by some labor organizations." However, in furtherance of this new additional policy Congress, in Section 8(b) of the amended Act, proscribed certain practices by *labor organizations,* and added certain obligations on the part of unions. It did not seek to accomplish its purpose by narrowing the previously existing proscriptions on *employer* conduct which had been contained, and continued to be contained, in Section 8(a)(1) and 8(a)(3), other than to add a statutory guarantee of free speech. If Congress had intended to accord employers the right to lock out employees temporarily in order to obtain bargaining concessions, notwithstanding the necessary impingement of such lock outs upon the concerted activities of employees, we believe it would have so provided expressly. This it did not do.

B. THE BARGAINING LOCKOUT IS NOT PRIVILEGED BY ANY LEGITIMATE COUNTERVAILING INTEREST OF THE EMPLOYER

As we have indicated, not every activity which interferes with protected employee rights is unlawful,

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[15] See also Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. of Chi. L. Rev. 614, 619 (1961).

for the adverse consequences of such conduct may be outweighed by legitimate countervailing interests. See *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 797–798; *National Labor Relations Board* v. *Erie Resistor Corp.,* 373 U.S. 221, 229–230. And the Court has specifically so recognized in the case of a lockout. *Buffalo Linen, supra.* The question becomes, therefore, whether a bargaining lockout such as the one involved here is privileged because of some overriding interest of the employer. The Board, we submit, reasonably concluded that it is not.

1. Since the Board found that there was no reasonable basis for fearing a strike, either immediately or in the foreseeable future, the only interest served by the lockout was the employer's interest in enhancing its bargaining position and bringing negotiations to a successful close. That interest alone did not outweigh the harm inflicted on the collective bargaining rights of the employees. A lockout is not required in order to assure the employer equality of bargaining power; for, if anything, the position of an employer during the course of the bargaining period is inherently more favorable than that of the union. So long as the employer rejects their demands, the employees, if unwilling to strike, must continue to render services under terms which are unacceptable to them but satisfactory to the employer. In the ordinary case, as here, it is the union, not the employer, which seeks to modify the existing terms of employment; yet, pending a new agreement, it is those terms which usually

remain in effect. Occasionally, to be sure, the employer is the party who wishes to change the *status quo*, demanding, for example, a wage reduction or a curtailment of fringe benefits. But, even in that situation, he has the right, after a bargaining impasse, to impose unilaterally the terms which the union has rejected. See *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224–225 (dictum); *National Labor Relations Board* v. *Tex-Tan, Inc.*, 318 F. 2d 472, 479–482, and n. 21 (C.A. 5); *Mission Mfg. Co.*, 128 NLRB 275.

The employer, therefore, unlike the union, has no need to exert offensive pressure, or for that matter even to obtain an agreement, in order to bring into being the conditions he desires. Indeed the ability of the employer to control the interim terms of employment is itself an effective form of pressure, for it confronts the employees with a Hobson's choice between accepting the limited concessions which the employer may have offered at the bargaining table or continuing to work under existing, and presumably less acceptable, conditions. It is true that the union may demand that the new contract apply retroactively to the bargaining period; but there is no assurance that this demand will be met or that the union will not have to concede other points in exchange. In these circumstances, the interest of the employer in forcing agreement and bringing negotiations to a prompt and favorable conclusion is plainly not of sufficient weight to justify the use of offensive pressure against his employees.

Nor is a preemptive lockout privileged by an employer's interest in avoiding the normal consequences of a possible strike during his busy season. We stress again the Board's finding that in this case such a strike was not reasonably foreseeable; the Union not only assured the employer that it had no present strike plans, but even proposed that the existing contract, which contained a no-strike clause, be extended indefinitely until a new agreement could be reached (R. 296). The result would be no different, however, even if the employer's fear were well-grounded.

A present and immediate interference with protected employee rights is not warranted by the mere possibility of a strike at an indeterminate time in the future. Moreover, it is the Board's judgment—and one which accords with the repeated Congressional solicitude for the integrity of the strike weapon—that the interest of the employer in being free of the ordinary hazards of a strike is outweighed by the interest of the employees in being free to use the strike weapon at a time of their own choosing. This does not mean, as petitioner suggests, that an employer must remain in a state of maximum vulnerability. On the contrary, he has potent weapons with which to resist a strike and preserve his bargaining position. For example, the right to hire permanent replacements for striking workers not only serves as an effective deterrent, but often enables the employer to continue operations even in the teeth of a strike. In addition, such countermeasures as the stockpiling of inventories and the transfer of orders to plants not affected by the

strike may substantially mitigate the impact of a work stoppage. It should not be overlooked, moreover, that a strike takes its toll from the union, as well as the employer, draining its funds, straining the allegiance of its members, and exposing them to the risk of permanent loss of their jobs. In light of these considerations, the Board was well within its discretion in concluding that the availability of the offensive bargaining lockout is unnecessary to maintain the employer's parity of bargaining power and that its impact upon protected employee rights is not offset by any countervailing employer interest.

2. The absence of any overriding justification for the bargaining lockout is underscored by a consideration of those lockouts which the Board has found privileged. As noted above the Board has sanctioned lockouts in two types of situations: when an imminently threatened strike would subject the employer to extraordinary forms of economic injury; and when a strike against one member of a multi-employer bargaining unit foreshadows a series of "whipsaw" strikes against the other members and thereby threatens to atomize the bargaining unit.

(a) The first class of cases is typified by *Building Contractors Assn. of Rockford, Inc.*, 138 NLRB 1405. There a group of contractors engaged in building roads, bridges, and overpasses, suspended operations in the face of an imminent strike threat by the union. It was shown, *inter alia*, that a "quickie" strike called during construction of a project would expose the employers to contractual penalties for late comple-

tion and would both endanger and inconvenience the public, that continuous pouring of concrete was essential to the construction of a bridge or highway once that operation was underway; and that the union had failed to give assurance that a strike would be heralded by adequate warning. In these circumstances, the Board held that the shutdown was a legitimate protective measure. Similarly, the Board has sanctioned lockouts where an imminently scheduled strike would have resulted in the spoilage of perishable inventories (*Duluth Bottling Association,* 48 NLRB 1335, 1359–1360), where the prospect of recurrent work stoppage made further operations uneconomical because of the employer's inability to plan production schedules (*International Shoe Co.* 93 NLRB 907), and where continued acceptance of automobile repair work would have been imprudent without assurance from the union that work already in the shop would be completed in the event of a strike, which was near at hand (*Betts Cadillac Olds,* 96 NLRB 268). In all of these cases, the purpose and effect of the shutdown was not to bludgeon the union into accepting the employer's bargaining demands, but rather to discontinue plant operations which could not be economically carried on in the face of an immediate strike threat, or which, if suddenly interrupted by a strike, would have subjected the employers to property loss, contract damages, or other economic injury above and beyond the loss of business normally incident to a work stoppage. See, generally, Koretz, *Legality of the*

Lockout, 4 Syracuse L. Rev. 251, 254–256, 269–270 (1953).

The situation here is obviously quite different. There was no strike threat, imminent or otherwise. The union disclaimed any intention of striking; promised that if a strike did occur, work already in the shipyards would be completed; and proposed the indefinite extension of the existing contract, including its no-strike clause. There was no showing that continued operation of the yards was uneconomical or would expose the employer to extraordinary risks. And, while the employer's motivation could perhaps be described as "defensive" in the sense that it wished to avoid the consequences of a future strike, the intermediate objective, unlike in the cases cited above, was purely offensive—to force the union to its knees and obtain its capitulation before the winter season arrived.

(b) The Board, with the approval of this Court, has also permitted the nonstruck members of a multi-employer bargaining unit to close their doors in response to a strike against one member to enforce contract demands against all. Such a strike carries with it the threat of successive strikes against the other members individually, and, but for the lockout, this "whipsaw" technique would pick off the members one by one, depriving them of the advantages of multi-employer bargaining and destroying the bargaining unit. Recognizing that multi-employer units had contributed to labor peace, that Congress had approved the Board's policy of certifying them, and

that the lockout was necessary to protect them against atomization, the Board concluded that the value of preserving such units justified resort to the lockout. *Buffalo Linen Co.*, 109 NLRB 447, affirmed *sub nom National Labor Relations Board* v. *Truck Drivers Local 449, supra.*[19]

To be sure, the danger of "whipsawing" may be just as great in the case of single-employer units. But the interests served by the multi-employer bargaining unit, and therefore safeguarded by the *Buffalo Linen* rule, are not confined to the protection of small employers against successive strikes, important though that factor may be. In addition, group bargaining benefits unions by assuring standardized wages for the employees they represent, minimizing their organizational expenses, and increasing their security against raiding by outside organizations; it affords unions and employers alike the convenience of having but one set of negotiations to prepare for, and a single contract to administer; it makes available greater resources for factfinding, research, and other aids to negotiation; and it frequently tends to enhance responsibility in bargaining. (See the Board's brief in *Truck Drivers' Local 449, supra,* pp. 23–24, and authorities cited therein.) No comparable interests

[19] Prior to *Buffalo Linen, supra*, the Board had held such lockouts unlawful. See *Morand Bros. Beverage Co.*, 91 NLRB 409, enforced in part and remanded in part, 190 F. 2d 576 (C.A. 7), on remand, 99 NLRB 1448, enforced on remand, 204 F. 2d 529 (C.A. 7); *Davis Furniture Co.*, 94 NLRB 279, remanded, 197 F. 2d 435 (C.A. 9), on remand, 100 NLRB 1016, set aside *sub nom. Leonard* v. *National Labor Relations Board*, 205 F. 2d 355 (C.A. 9).

are jeopardized by the threat of a strike against an employer not a member of such a unit.

It should be emphasized, moreover, that the rule of *Buffalo Linen*, unlike that advocated by the petitioner here, does not deprive the union of control over the timing of the economic contest. It merely provides that if the union strikes one member it must be prepared for work stoppages at the other plants as well. The initiative, however, remains with the union. It may postpone its strike until the busy season without fear of being victimized by a preemptive lockout. And, until the union has actually wielded the strike weapon, the members of a multi-employer unit have no more right than the single employer to resort to a lockout. In sum, the interference with protected employee rights is far less drastic in the *Buffalo Linen* situation than it is here, while, on the other hand, the countervailing interests are more substantial.

In sum, we submit that the balance struck by the Board was a reasonable one and well within its discretion. Accordingly, the court below properly held that there was "no basis for disturbing the Board's conclusions." [20] (R. 325).

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[20] Some writers, to be sure, have expressed the view that the lockout is the counterpart of the employees' strike weapon. See the quotation from Millis and Montgomery, *Organized Labor*, at p. 13 of the petitioner's brief. See also Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining*, 50 Harv. L. Rev. 1071, 1110 (1937); and the excerpts set forth in Koretz, *Legality of the Lockout*, 4 Syracuse L. Rev. 251, 268, n. 82 (1953).

In some instances, however, it appears that the writer is

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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DECEMBER 1964.

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merely describing the tactics which employers and unions have historically used in organizational campaigns, without considering the further question of whether, and to what extent, the use of such tactics has been qualified by the National Labor Relations Act. The first part of the quotation relied on by petitioner (Br. 13), for example, reads in full as follows (Millis and Montgomery, *Organized Labor*, 554 (1945)): "* * * In exerting pressure upon employers to recognize them and to accept their demands, unions, provided argument is unsuccessful, resort to the strike, the boycott, and possibly violence and sabotage. The employers resort to corresponding methods—the lockout, the black list, and violence. * * *" It is clear that the Act restricts the use of the black list and violence; the same applies, we submit, to the lockout.

Moreover, to the extent the statements may be interpreted as expressing the view that a lockout by a single employer to advance his bargaining position is an integral element of the system of collective bargaining, and necessary to balance the

union's strike weapon, we submit that they reflect an incomplete analysis of the problem, and are contrary to experience. For these commentators, many of whom wrote in the early days of the Act, do not mention the countervailing management weapons which have led the Board to conclude that there is no need, in the ordinary case, to add the lockout to management's arsenal. Judge Magruder's article, *supra*, was written before this Court decided in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, that employers could offer strikebreakers permanent employment. Furthermore, an employer's right unilaterally to change working conditions once an impasse has been reached was not clearly articulated by the Board until 1948, in *W.W. Cross & Co.*, 77 NLRB 1162, 1165-1166, although that view may have been the basis of decision in two earlier cases, *Southern Prison Co.*, 46 NLRB 1268 (1943) (alternative ground), and *Exposition Cotton Mills Company*, 76 NLRB 1289, 1291–1292 (1948).

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*) are as follows:

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers and members, have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract

for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

The relevant provisions of the Labor Management Relations Act are as follows (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

TITLE II

SEC. 203. * * *

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

* * * * *

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

* * * * *

SEC. 208. (a) Upon receiving from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

* * * * *

APPENDIX B

United States Court of Appeals for the Second Circuit

No. 50—September Term, 1964

(Argued October 6, 1964. Decided December 3, 1964)

Docket No. 28589

BODY & TANK CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before LUMBARD, *Chief Judge,*
HAYS and ANDERSON, *Circuit Judges*

Petition for review of an order of the National Labor Relations Board, 144 N.L.R.B. No. 136 (1963), based upon a finding of violation of Sections 8(a) (1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a) (1), (3) and (5) (1958 and Supp. V, 1964). The Board seeks enforcement.

Petition denied; order enforced.

HARRY B. SALE, New York, N.Y. (Sale & Sale, Robert Sale, on the brief), *for Petitioner.*

MELVIN J. WELLES, Attorney, NLRB, Washington, D.C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Vivian Asplund, Attorney, NLRB, of counsel), *for Respondent.*

SIPSER, WEINSTOCK & WEINMANN, New York, N.Y. (Richard Dorn, on the brief), *for Local No. 455, International Ass'n of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, amicus curiae.*

HAYS, *Circuit Judge:*

Petitioner Body and Tank Corp. asks that an order of the National Labor Relations Board, 144 N.L.R.B. No. 136 (1963), based upon a finding of violation of Section 8(a) (1), (3) and (5) of the National Labor Relations Act[1] be set aside. The Board seeks enforcement of its order.

Petitioner, a manufacturer and distributor of structural steel products, had a collective bargaining agreement with Local 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, which terminated on January 31, 1963. Negotiations for a new agreement were carried on during November and January, but on January 31, an issue concerning the vacation clause remained unresolved. The Company proposed to revise the vacation clause to conform the vacation schedule to that in the Union's contract with the Allied Association of Structural Steel Manufacturers while the Union

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[1] 29 U.S.C. § 158(a) (1), (3) and (5) (1958 and Supp. V, 1964).

wanted to continue the clause contained in the agreement which had just expired. On Friday, February 1, there were further fruitless efforts at agreement and on Monday, February 4, the Employer excluded the members of the bargaining unit from their jobs.

The first issue for our determination is presented by the conflicting interpretations of the Employer's action in excluding the employees. The Board has found that the Employer locked out the employees, with the intent of forcing them to agree to the proposals of the Employer for a collective agreement. The Petitioner maintains that it merely laid off the men for lack of work.

The record reveals that when the employees applied for unemployment compensation, the Employer stated that their loss of employment was due, not to a layoff, in which case they would have received compensation, but to a "labor dispute." This prevented their getting unemployment benefits.

This admission by the Employer, the evidence of the Employer's repeated assertions "no contract, no work," and of an assurance by the Employer that the employees would be put back on the job the day after the contract was signed, together with the failure of the Employer's evidence to establish any economic necessity for laying off the employees (the employees who were not in the bargaining unit were not laid off) support the Board's view of the Employer's action as constituting a lockout.

We hold that this evidence is sufficient when considered in the background of the record as a whole to support the finding that the employees were locked out by the Employer for the purpose of enhancing its bargaining position. See *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

The Employer's alternative contention, that it locked out the employees because of the threat of a strike, finds no corroboration in the evidence.

The more difficult issue is whether the Board was correct in holding that the Employer violated the Act by resorting to a lockout to further its bargaining position. This is a case of first impression in this circuit. The circuits which have passed on the issue are in disagreement. The Third,[2] Tenth,[3] and District of Columbia[4] Circuits have upheld the Board's position; the Fifth Circuit[5] has rejected it.

In *NLRB* v. *Truck Drivers Union*, 353 U.S. 87 (1957), the Supreme Court upheld the Board in ruling that an employers' association could use a lockout defensively against a union's whipsawing tactics designed to destroy a multi-employer bargaining unit. In its opinion in the *Truck Drivers* case the Court stated that it was not "called upon to define the limits of the legitimate use of the lockout" and that it was "unnecessary to pass upon the question whether, as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike."[6]

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[2] *Quaker State Oil Ref. Corp.* v. *NLRB*, 270 F. 2d 40 (3d Cir.), certiorari denied, 361 U.S. 917 (1959).

[3] *Utah Plumbing and Heating Contractors Ass'n* v. *NLRB*, 294 F. 2d 165 (10th Cir. 1961).

[4] *Local 374, International Brotherhood of Boilermakers*, v. *NLRB*, 331 F. 2d 839 (D.C. Cir. 1964), certiorari granted *sub nom. American Shipbuilding Co.* v. *NLRB*, 33 U.S.L. Week 3128 (U.S. Oct. 12, 1964) (No. 255).

[5] *NLRB* v. *Dalton Brick and Tile Corp.*, 301 F. 2d 886 (5th Cir. 1962); cf. *Leonard* v. *NLRB*, 197 F. 2d 435 (9th Cir. 1952), after remand, 205 F. 2d 355 (1953); *Morand Bros. Beverage Co.* v. *NLRB*, 190 F. 2d 576 (7th Cir. 1951), after remand, 204 F. 2d 529 (1953).

[6] 353 U.S. at 93 and n. 19.

Of the roles of the courts and the Board in respect to the issue of the legality of a lockout in any particular situation the Court said:

> "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." [7]

The Board argues that the lockout is not the corollary of the strike since the strike is a protected activity under Section 7 [8] and is given a preferred position under Section 13,[9] while the lockout is clearly unlawful in some situations, as, for example, when it is used for the purpose of interfering with unionization. *NLRB* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (2d Cir.), certiorari denied *sub nom. Modern Mfg. Co.* v. *NLRB*, 344 U.S. 816 (1952).

The Board contends that the lockout engaged in to further the employer's bargaining position is a viola-

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[7] 353 U.S. at 96.

[8] 29 U.S.C. § 157; "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[9] 29 U.S.C. § 163: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

tion of Section 8(a)(1) [10] and Section 8(a)(3) [11] because it interferes with the right to strike, "blunts" the strike weapon, discourages union activity, and unduly diminishes the union's bargaining power. It "tips the scales in favor of the employer." The Board points out that, to counterbalance the strike weapon, the employer has the right to replace striking employees,[12] and after an impasse to institute unilaterally terms of employment which the employees have rejected.[13] To give the employer in addition the right to a bargaining lockout would be to defeat the Congressional purpose in increasing union bargaining power by statutory protection of the right to strike.

The Board has found that the Employer's conduct also violates Section 8(a)(5).[14] The finding as to Section 8(a)(5) is dependent on the finding as to Sections 8(a)(1) and 8(a)(3). The Board holds, in

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[10] 29 U.S.C. § 158(a): "It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

[11] *Supra* n. 10.

[12] *NLRB* v. *Mackay Radio and Tel. Co.*, 304 U.S. 333 (1938).

[13] *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224–225 (1949) (dictum).

[14] *Supra* n. 10.

effect, that an employer who uses in collective negotiations a method which is unlawful because it interferes with and restrains employees and by discrimination discourages union membership is refusing to bargain collectively as required by the Act.

We cannot say that the Board's interpretation of the statute is not correct or that the Board is in error in applying that statutory interpretation to the facts of the present case. In this area which the Supreme Court has told us is one of delicate balance between conflicting interests, we cannot say that the balance struck by the Board is outside the scope of its competence.

Petition for review denied; enforcement granted.

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